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QUESTIONS PRESENTED

1. Whether the Court of Appeal was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance did not effect a federal taking by failing to permit unregulated increases in space rent whenever a mobilehome is transferred from one homeowner to another.

2. Whether the Court of Appeal was correct in ruling that the City of Escondido's Mobilehome Rent Protection Ordinance does not violate federal substantive due process by failing to permit unregulated increases in space rent whenever a mobilehome is transferred from one homeowner to another.

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BRIEF FOR RESPONDENT

STATEMENT

Petitioners, owners of mobilehome parks in Escondido, California, challenge the City of Escondido's Mobilehome Rent Protection Ordinance ("Ordinance") on the grounds that it violates the Taking and Due Process Clauses of the United States Constitution.[1] Petitioners would have this Court believe that, in an act of political caprice, the voters of Escondido enacted an ordinance that stripped mobilehome park owners of their rights to possess, derive rents from, realize appreciation in, and dispose of their property, and transferred those rights to mobilehome owners residing in their parks. In fact, the Escondido Ordinance simply regulates petitioners' use of their property—which was already dedicated to a highly regulated business purpose—in order to keep rents affordable and to protect the legitimate investment expectations of mobilehome owners in their mobilehomes. As such, the Ordinance is an entirely permissible exercise of Escondido's police power, and does not violate either the Taking or the Due Process Clause of the Constitution.

I. PROCEDURAL HISTORY OF THE CASE

On July 30, 1986, petitioners John and Irene Yee purchased Sunset Terrace and Friendly Hills Mobilehome Parks, which are located within the city limits of respondent City of Escondido.[2] At about that time, the average

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[1] There are eight petitioners in this case. In addition to John and Irene Yee, the other petitioners are the H.N. and Frances C. Berger Foundation, Mountain Shadows Mobile Home Estates, Richard C. Kuebler, dba Moonglow Mobile Home Park, Casa de Amigos Mobile Home Estate, Vista Verde, Ltd., Imperial Escondido Mobile Estates and Mildred D. Tacey. Four other park owners whose suits are described in note 4, *infra*, did not join in the Petition for Certiorari. For convenience, respondent will use the term "petitioners" when referring to all petitioners, and will identify individual petitioners where appropriate.

[2] *See Yee* v. *Mobilehome Park Rental Review Bd.*, No. N51754, Administrative Record at 379-80 (San Diego Super. Ct. 1991), and

space in these parks rented for approximately $203 (Sunset) and $205 (Friendly Hills) per month. By June 1988 the Yees had raised the average rents to $264 (Sunset) and $263 (Friendly Hills), an increase of 28-30%.[3] On July 8, 1988, pursuant to Escondido's Mobilehome Rent Protection Ordinance, these rents were rolled back to the 1986 rent levels. See *infra* pp. 11-12 (discussing the regulatory history).

On December 1, 1988, rather than seeking a rent increase as permitted by the Ordinance, petitioners filed this suit in the Superior Court of San Diego County. They alleged that the Ordinance deprived them "of all use and occupancy of [their] real property and [granted their] tenants . . . the right to physically permanently occupy and use [their] real property" without compensation "other than the stream of income from rents regulated by the Rent Control Law." Complaint ¶ 6; Joint Appendix ("JA") 3. They further alleged that their "tenants" could sell their "coaches" at excess values "due to the rights of permanent physical occupation at a fixed reduced rent which [had] been transferred to" them by the Ordinance. *Id.* at ¶ 8; JA 4. Accordingly, they alleged that the Ordinance effected a "taking" of their property in violation of Article I, § 19 of the California Constitution, the Fifth and Fourteenth Amendments of the United States Constitution, and their rights under 42 U.S.C. §§ 1981 and 1983, and they sought damages of $6 million. *Id.* at ¶¶ 10-12; JA 4-5. In a second cause of action, petitioners alleged that the Ordinance was constitutionally infirm because no emergency justified its

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Yee v. *Mobilehome Park Rental Review Bd.*, No. N51755, Administrative Record at 428-29 (San Diego Super. Ct. 1991) (respectively describing Sunset Terrace and Friendly Hills and the Yees' rent increase applications for these parks).

[3] During the same period the U.S. Department of Labor, Bureau of Labor Statistics, reported that the "All Items" Consumer Price Index (CPI) for urban consumers in the San Diego Metropolitan area (1982-84=100) rose from 113.3 (July 1986) to 121.9 (1st half 1988), a 7.5% increase, and the San Diego "Rent, residential" CPI rose from 130.8 to 138.4, a 5.8% increase.

enactment. *Id.* at ¶ 16; JA 5. Petitioners did *not* allege that the Ordinance effected a "regulatory taking" under the criteria of *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978). On March 30, 1989, the Superior Court granted the City's Demurrer and dismissed petitioners' complaint. Pet. App. C42-44.[4]

On appeal, petitioners reiterated their "physical occupation" taking theory and added a substantive due process claim alleging that the Ordinance was irrational because it did not preserve low- and moderate-income housing opportunities. The Fourth District Court of Appeal rejected both arguments and affirmed the trial court's decision. Pet. App. A1-40. Specifically, the Court rejected the Ninth Circuit's reasoning in *Hall* v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert. denied*, 485 U.S. 940 (1988), upon which petitioners principally relied, and concluded that the Ordinance did not effect a physical occupation of petitioners' property. Pet. App. A3-4. After recognizing the complementary relationship between mobilehome park space rents and the resale price of mobilehomes sold in place in parks (*id.* at A8-11), the court added:

> [w]here the price charged for a good or service is excessively high due to monopoly or other unfair conditions, it necessarily follows that the price for complementary goods and services will be artificially low. Where a government regulation purports to reduce the excessive and unfair price to a reasonable level,

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[4] During the period May 12, 1989 to June 16, 1989, eleven additional suits were filed by other mobilehome park owners seeking an additional $40 million in damages from City. By late September 1989 each of the cases had been dismissed by the San Diego Superior Court and all cases had been appealed to the state Court of Appeal. On May 16, 1990, pursuant to stipulation of the parties, all cases were consolidated for purposes of appeal and decision by the Court of Appeal. The parties further agreed that all cases would be submitted for decision by the Court of Appeal on the briefs and oral argument in the *Yee* case. Stipulation and Order, Opposition to Petition A4-6.

> the mere fact that the price for complementary goods and services rises as a result does not transmute an otherwise reasonable price regulation into a compensable "taking."

Id. at A11-12. The Court of Appeal then determined, on the basis of the only record before it, that the controlled rents were "fair and reasonable":

> [P]laintiffs' complaints never allege the Escondido ordinance is irrational because it denies them fair and reasonable rents. Indeed, the owners have never attempted to obtain Escondido's approval for what they consider to be a "fair" rent. In the absence of such a contention, we assume the rents provided for by the ordinance are fair. If they are, there is no "taking."

Id. at A14. Because the issue was not raised by petitioners, the Court did not address the question whether the Ordinance effected a regulatory taking under the criteria of *Penn Central*.

Since they filed this suit, the Yee petitioners have sought and received rent increases.[5] Because they were unsatisfied with these increases, they sought review and damages from the City in a state law action under Sections 1094.5 and 1095 of the California Code of Civil Procedure.[6]

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[5] On June 2, 1989, the Yees filed applications seeking rent increases under the Ordinance of $131 per month (64%) for Sunset Terrace and $129 per month (63%) for Friendly Hills. In addition to arguing that the rent rollback to 1986 levels was unconstitutional, the Yee's contended that they needed the requested increases in order to obtain a fair return based on the current market value. On December 5, 1990, following a hearing, the Board granted a $27.50 per month (13%) increase for each park.

[6] On October 25, 1991, the San Diego Superior Court upheld the Board's rent decisions and dismissed the damage claims. *Yee* v. *Mobilehome Park Rental Review Bd.*, Nos. N51754, N51755 (San Diego Super. Ct. 1991). By December 27, 1991, petitioners had filed a notice of appeal to the Court of Appeal.

II. REGULATORY HISTORY

Despite their name, modern mobilehomes (sometimes referred to as manufactured housing) are a form of immobile prefabricated housing. Indeed, because moving and installing such homes entails substantial costs, and because spaces in mobilehome parks are often scarce, most mobilehomes make but one trip—from the factory or showroom to an installation site. Their immobility—*i.e.*, the fact that they are fixed and permanent residences—and their relatively low cost have made these homes extremely popular.[7] Their immobility and the scarceness of mobilehome park spaces, however, gave rise to the problems that Escondido sought to redress through the ordinance at issue in this litigation.

A. The Development Of Mobilehomes As A Legitimate Residential Alternative

The first mobilehomes, which were typically homemade and most frequently used for camping, were trailers of a few hundred square feet that could easily be hitched to vehicles. To accommodate these trailers, many municipalities built camps during the 1920's hoping to encourage tourism. While long-term occupancy of such camps was not uncommon, it was not until the Depression of the 1930's that use of these trailers as a form of permanent housing became widespread. During the next decade, nu-

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[7] Today, mobilehomes situated on rented spaces in mobilehome parks account for more than two million residences in the United States. More than 375,000 such residences, in approximately 5,800 mobilehome parks, are located in California. *See* California Department of Housing and Community Development, Division of Codes and Standards, *Summary of Mobilehome Park Statistics* (Aug. 28, 1990). Escondido has a total of 29 active mobilehome parks containing approximately 3,500 spaces. California Department of Housing and Community Development, *Mobilehome Parks in Escondido* (Oct. 19, 1990). Based on an average household size of 1.69 persons (San Diego Association of Governments, *City of Escondido's Mobile Home Needs Survey* 5 (1988)), the City estimates that over 6,000 of Escondido's 104,000 inhabitants reside in mobilehomes. Approximately 3,100 (87%) of the spaces are rented from the park owners, with the remaining spaces owned by homeowners.

merous additional mobilehome parks were built to meet immediate and temporary housing needs, particularly near military bases. These origins helped foster the early perception of "trailer parks" as a form of "slum" housing inhabited by indigent and rootless members of society. This image, together with hostility from real estate interests, hotels, and tourists camps, initially fostered local land use regulations designed to exclude mobilehome parks or restrict their development.

Beginning in the 1950's, however, mobilehomes began a gradual transformation to broadly accepted permanent residences. Larger, standardized, sectionalized mobilehomes were manufactured which could be moved only by trucks,[8] and today homes of 1400 square feet or more are increasingly common. With the advent of these larger units, which permitted more conventional floor plans, mobilehomes became accepted as permanent living quarters.

The trend toward physical immobility and permanence coincided with extensive efforts to improve the quality of mobilehome parks, which evolved from small, unplanned facilities to larger, carefully designed communities that often featured amenities such as clubhouses, swimming pools, greenbelts and landscaping, and extensive social programs. Many senior citizens[9] and younger families[10] have been attracted to mobilehome park living by these amenities and by the relatively low housing cost.

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[8] For example, between 1955 and 1980, the average size of mobilehomes tripled from approximately 360 to 1050 square feet. Nutt-Powell, *Manufactured Homes: Making Sense of a Housing Opportunity* 53 (1982); Drury, *Mobilehomes: The Unrecognized Revolution in American Housing* 102 (rev. ed. 1972).

[9] The March 27, 1990, County of San Diego, *County-Wide Mobilehome Task Force Final Report* found that 80% of the spaces in the County were occupied by "senior households," which are "generally small elderly families with fixed incomes." *Id.* at 5.

[10] Mobilehomes "allow young families to afford a home they would otherwise be unable to buy in today's excessively priced market. Not only do these families receive the positive benefits from pride of home ownership, but it also allows them to gain a foot hold in the market and perhaps purchase some other form of housing in later years." *Id.*

Recognizing the valuable contribution they made to the nation's stock of affordable housing, the federal government, beginning in the late 1960's and early 1970's, adopted a number of measures that spurred the growth and social acceptability of mobilehomes. Congress, for example, extended insurance for mobilehome park construction and purchases of mobilehomes[11] and authorized the adoption of uniform federal standards that both promoted mobilehome safety and preempted diverse and conflicting local design specification standards that had hindered mobilehome production.[12] By 1982, these efforts and a number of demographic trends had combined to make mobilehomes

> a significant source of affordable housing for American families, particularly first-time homebuyers, the elderly, and low- and moderate-income families. Manufactured homes accounted for almost 36 percent of all single-family homes sold in the United States in 1981, and for the vast majority of those sold for under $50,000.[13]

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[11] *See generally Shepard's Mobile Homes and Mobile Home Parks*, § 4.2 (1975 ed. & Cum. Supp. 1990-91) (describing federal legislation, including 12 U.S.C. § 1464(c)(6)(J), which authorized federal savings associations to finance manufactured homes).

[12] National Manufactured Housing Construction and Safety Standards Act of 1974, Pub. L. No. 93-383, 88 Stat. 700 (1974), as amended by Pub. L. No. 96-399, 94 Stat. 1641 (codified at 42 U.S.C. § 5401 *et seq.*).

[13] *The Report of the President's Commission on Housing* 85-86 (1982). Although the prices of mobilehomes vary greatly depending on their size, condition and location, the average reported resale price of a mobilehome sold in place on a rental space in the Escondido area is approximately $30,000. California Mobilehome Report, Appraisal Edition, *Resales, San Diego County* (June-Aug. 1991). This is approximately one quarter of the price of a conventional site-built home in the same area. North San Diego County Multiple Listing Service, *Single Family Properties* (Jan.-Sept. 1991) (median sales price of home in Escondido area $125,000).

As mobilehomes have become more permanent, the relationship between park owners and homeowners has shifted from a strict landlord-tenant relationship (similar to that in residential apartments) to a relationship between co-investors in a joint venture. In this relationship, the park owner provides investment in the site, utilities, and other amenities and the homeowner provides concurrent investment in the mobilehome and its appurtenances.[14] Both parties to this relationship have obligations: The homeowner is obligated to pay rent and abide by the rules of the park; the park owner is obligated to provide space, amenities, and a safe and sanitary park. Likewise, where neither party has an unfair bargaining position, both parties may benefit: The homeowner receives a location for his home investment and the park owner receives a return on his park investment through space rent. Where there is a shortage of available spaces, however, the park owner can take advantage of the fact that the homeowners in his park cannot simply withdraw their investments and the park owner can charge monopoly rents. Even when there are other spaces available, the park owner may be able to extract excessive rents from homeowners because it is extremely expensive to move a "mobile" home.[15] In these situations, individual homeowners may have no choice—they must pay the excessive rent or lose their entire investment.

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[14] While a park owner's investment may vary greatly depending upon the land cost, amenities provided, and year of purchase or construction, it is rare that a park owner's investment per space equals that of the homeowner's. *See, e.g.*, City of Los Angeles, Rent Stabilization Division, Community Development Department, *Rental Housing Study: Mobile Home Parks Under Rent Stabilization* ("Los Angeles Study") 11, 33 (1985) (average mobilehome owners have triple the investment of park owners in their spaces); *see also Oceanside Mobilehome Park Owner's Ass'n* v. *City of Oceanside*, 157 Cal. App.3d 887, 204 Cal. Rptr. 239, 255 n.10 (Cal. Ct. App. 1984) ("collectively, the manufactured home owners have a greater investment than does the manufactured home park owner").

[15] *See* Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 419-20 (1988) (describing this as "quasi-rent").

B. The California Mobilehome Residency Law

Despite the increasing importance of mobilehomes to the stock of affordable housing in California, the very nature of mobilehome parks limits their development. In populated areas, the very large amount of land necessary for a mobilehome park makes new development rare. In addition, minimum lot sizes, density restrictions, and zoning requirements further limit park development. The increasing demand for mobilehomes as housing, combined with the fact that new parks are not being developed, creates a situation where the vacancy rate in mobilehome parks is near zero, both in Escondido[16] and elsewhere.[17]

Because of this scarcity, park owners in California are in a substantially better bargaining position than mobilehome owners. Many park owners have in the past taken advantage of their monopoly power by charging exorbitant entrance fees, tying use of the mobilehome space to the purchase of unwanted services, and charging excessive exit fees to residents who wished to sell their mobilehomes in place. By evicting homeowners who could not relocate elsewhere, park owners also have been able to purchase the residents' homes at distress prices.

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[16] At the Yee petitioners' subsequent rent increase hearing, petitioners' own appraiser introduced evidence of rents at 14 other comparable parks. As to each he described "vacancies" as "0" or "none." *See Yee* v. *Mobilehome Park Rental Review Bd.*, No. N51755, Administrative Record at 98-128 (San Diego Super. Ct. 1991).

[17] In Los Angeles, vacant mobilehome spaces "were found to be virtually non-existent." Los Angeles Study at 56. Studies of mobilehome parks in Alameda, Santa Clara, and Ventura counties made similar findings. Baar, *Mobilehome Ownership in Fremont* 13-14 (Aug. 1991) (no vacancies found in Santa Clara or Alameda Counties); Sanchez Talarico Associates, Inc., *Alternative Location and Replacement Housing Opportunities Study for Oxnard Mobile Home Lodge* 52 (Sept. 1988) (fewer than one out of every 1,000 spaces in Ventura County vacant).

To prevent many of these abuses, the California legislature enacted the Mobilehome Residency Law (Cal. Civ. Code § 798 *et seq.* (Deering 1990)), to limit park owners' otherwise unfettered discretion to evict homeowners or to refuse to rent spaces to prospective purchasers of mobilehomes. In passing the law, the legislature specifically found that "the owners of mobilehomes occupied within mobilehome parks [should] be provided with the unique protection from actual or constructive eviction." *Id.* at § 798.55(a). Even with the protections that this statute affords homeowners, however, park owners may terminate or refuse to renew a homeowner's tenancy for a number of reasons, including failure to pay rent, utility charges or reasonable incidental service charges (*id.* at § 798.56(e)); failure to comply with local ordinances (*id.* at § 798.56(a)); substantially annoying other homeowners (*id.* at § 798.56(b)); or failure to comply with reasonable rules and regulations. *Id.* at § 798.56(d).

Moreover, park owners may charge a transfer fee as a condition of sale if they perform certain services (*id.* at § 798.72); may forcibly remove a home at the time of sale if it fails to meet certain size, health and safety standards (*id.* at § 798.73); and may refuse to rent to a new homeowner who lacks the financial ability to pay the rent or whom the park owner reasonably determines, based on the purchaser's prior tenancies, will not comply with the rules and regulations of the park. *Id.* at § 798.74. Finally, and perhaps most critically, the statute specifically recognizes the right of park owners to alter the use of their property entirely. *Id.* at § 798.56(g).[18]

[18] To alter the use of a park, the management must, *inter alia*, provide notice to the homeowners that it intends to seek a permit for change of use (Cal. Civ. Code § 798.56(g)(1) (Deering 1990)), and, after approval of the change of use by the appropriate government entity, it must give homeowners at least six months notice of termination. *Id.* at § 798.56(g)(2).

C. The Escondido Mobilehome Rent Protection Ordinance

Even with these protections in place, park owners remained free to extract higher rents than they could collect in a competitive housing market, and indeed rents increased rapidly during the late 1970's and early 1980's. To combat this problem approximately 75 jurisdictions adopted mobilehome rent control statutes by the mid-1980's. Hirsch & Hirsch, *Legal-Economic Analysis of Rent Controls in a Mobile Home Context: Placement Values and Vacancy Decontrol*, 35 UCLA L. Rev. 399, 406-07 (1988). Most of these statutes contained restrictions on the rents a park owner could charge a new owner when a mobilehome was sold or transferred on site. *Id.* at 412.

The City of Escondido's initial response was not to impose rent control. Instead, it encouraged homeowners and park owners to engage in negotiations that in 1983 yielded a Mobilehome Park Accord Ordinance (Escondido Ordinance 83-34) that established a mechanism for resolving disputes.[19] Rents, however, continued to escalate, and on June 8, 1988, the voters of Escondido approved the initiative ordinance (Proposition K) that is the subject of this suit by a margin of 11,148 votes for to 7,850 against. *San Diego Union*, June 9, 1988, at A4.[20]

[19] The Accord Ordinance permitted 51% of the homeowners in a park to seek to resolve problems, including rent disputes, through mediation by a committee consisting of representatives chosen by both homeowner and park owner groups. Although the Accord procedure was used at least seven times during 1983-86 period, it had limited utility because the Accord Committee's recommendations were not binding on the park owners.

[20] Proposition K was subsequently ratified by City Council Resolution 88-291 on June 28, 1988, and has been codified at section 29-101 *et seq.* of the Escondido Municipal Code. The Ordinance became effective July 8, 1988. On August 24, 1988, the City enacted Urgency Ordinance 88-50 to (1) prevent park owners from forcing existing and prospective homeowners to sign long term leases, and (2) provide notice that such long term leases might exempt spaces subject to such leases from the benefits of rent protection. JA 16-18.

Because several park owners had been increasing their rent in anticipation of rent control, the Escondido Mobilehome Rent Protection Ordinance set the "base rent" at the rental rate of January 1, 1986. Ordinance § 3; JA 23. Park owners, however, are entirely free to seek rent increases whenever and as often as they choose. To obtain such an increase, a park owner must file an application with the City Community Development Department. *Id.* at § 4(a); JA 24.[21] Once an application is complete, notice is mailed to affected homeowners (*id.* at § 4(c); JA 24), who then have the right to submit written statements, and other documents in response. *Id.* Within 60 days after the application is complete, the Mobilehome Park Rental Review Board ("Board")[22] must hold a hearing (*id.* at § 4(e); JA 25), at which the park owner and the affected homeowners may offer any testimony that is relevant to the requested rent increase. *Id.* at § 4(f); JA 25. Following the hearing the Board considers 11 stated factors "in addition to any other factors it considers relevant" (*id.* at § 4(f) & (g); JA 25-27), and based on this evaluation "the Board . . . shall approve such rent increases as it determines to be just, fair and reasonable." *Id.* at § 4(g); JA 25. The determination of the Board is subject to review by the state courts. Cal. Civ. Proc. Code § 1094.5 (Deering 1990).

The Rent Protection Ordinance is only one element in Escondido's evolving effort to solve mobilehome problems. Over the past few years the City has: (1) assisted in the

[21] There is no restriction on the number of spaces that must be included in the park owner's application, *i.e.*, it can be "for one or more mobilehome spaces" (*see* Ordinance § 4(a); JA 24), nor is there a restriction on the number of times per year that such an application can be made. The Ordinance waived the application fee for the first 180 days after the law went into effect (*id.* at § 4(b); JA 24), and the application fee waiver was later extended by resolution to December 1, 1989. Pursuant to Escondido Resolution No. 91-256, the current cost of an application fee is $850 plus $2 for each affected space.

[22] The members of the Board are also the City Council members. *See* Ordinance § 2; JA 22.

conversion of Rancho Escondido, a 338 space park, by helping the homeowners obtain interim financing to allow them to purchase their spaces and by providing low-income purchasers with loans totaling $500,000; and (2) purchased the Views, a 152 space park, for $5.6 million, and Mountain Shadows, a 209 space park, for $7.8 million.[23] The City is currently operating both parks and is providing assistance to the homeowners in these parks to purchase their own spaces, including approximately $1.3 million in loans for low-income purchasers at the Views and $1.7 million in loans for low-income purchasers at Mountain Shadows.[24]

SUMMARY OF ARGUMENT

I.

A. This Court's "takings" decisions have consistently distinguished between physical occupation of an individual's property and mere regulation of the use of that property. Physical occupation is a *per se* taking, which requires compensation, and therefore the Court has narrowly restricted the type of claims that fall within this category. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

Even though Escondido's Rent Protection Ordinance does nothing more than regulate the monopoly rents petitioners may charge mobilehome owners, petitioners assert that the Ordinance effects a government-authorized permanent physical occupation of their property. This attempt to recast a rent control provision as a permanent physical occupation is untenable and would undermine completely the value of having a bright-line rule for this

[23] The City acquired Mountain Shadows Mobilehome Estates in March, 1991. The parties to the transaction agreed to dismiss all pending litigation and release all claims. Accordingly, the City believes that Mountain Shadows, a petitioner in this case, is no longer a proper party to these proceedings.

[24] All three of the above mentioned parks are subject to rent protection for the spaces which continue to be rented.

form of taking. If this regulatory scheme constitutes a physical occupation, it is impossible to predict what actions will be treated as *per se* takings by the courts.

The "element of required acquiescence" lies "at the heart of the concept of [physical] occupation." *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987). That requirement is completely missing from legislation that regulates the amount of rent paid to occupy property that the property owner voluntarily holds out for rent. Moreover, the Ordinance's regulation of rents does not deprive mobilehome park owners of any recognizable—much less legally protected—interest in property; it merely prevents them from taking unfair advantage of their monopoly power.

B. Petitioners' alternative "takings" argument, that the Ordinance effects a "regulatory taking" under the criteria of *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104 (1978), also fails. First, this argument is not properly before this Court because it was neither litigated nor decided below. See *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983). Moreover, because petitioners did not seek a rent increase prior to instituting this suit, it is plainly unripe. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985).

Even if the regulatory taking claim had been properly presented, it is without merit because the Ordinance, on its face, does not deprive petitioners of all economic use of their property; they continue to rent their property and receive a fair and reasonable return. Certainly nothing in the Constitution requires them to receive more than a reasonable return on their investment. See *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495-96 (1987).

In addition, the Ordinance substantially advances legitimate state interests. It directly protects current homeowners from excessive rents and provides them with reasonable assurance that their investments in their homes will not be jeopardized by unrestricted rent increases.

As the Ninth Circuit has correctly held, "the ordinance does protect existing tenants from being forced to sell their [homes] at distress-sale prices in the event landlords were to set rents for new tenants so high that no one would want to buy the[ir] coach[es]." *Azul Pacifico, Inc.* v. *City of Los Angeles*, 1991 WL 224528, at *6 (9th Cir. Nov. 1, 1991). The Ordinance also protects the investments of future homeowners and provides them with a measure of financial stability.

II.

Petitioners' Due Process argument fails for essentially the same reasons that their "takings" argument fails; the Ordinance does substantially advance a legitimate state interest. The Ordinance, quite simply, is a rational and legitimate response to escalating rents which threatened the welfare of current and future mobilehome owners. At the same time, the Ordinance ensures that park owners can continue to receive a just and reasonable return on their investments. As such, it clearly satisfies the requirements of substantive due process as applied to economic regulation. See, *e.g.*, *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 491 (1955).

ARGUMENT

I. ESCONDIDO'S ORDINANCE DOES NOT VIOLATE THE TAKING CLAUSE OF THE FIFTH AMENDMENT.

A. The Escondido Mobilehome Rent Protection Ordinance Does Not Effect A Permanent Physical Occupation Of Petitioners' Property.

The Fifth Amendment's requirement of just compensation when government takes private property for a public purpose has historically been viewed as an eminent domain provision. See Blackstone's Commentaries app. 305-06 (G. Tucker ed. 1803); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 176 (1979); *Chicago, B. & Q. R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897). With the expansion of government regulation of private economic activities, however,

the issue arose whether such regulation also constituted a "taking" within the meaning of the Fifth Amendment. Stated differently, the constitutional issue posed by state economic regulation was the extent to which the Taking Clause imposes restrictions on the government's exercise of its police powers.

In "takings" cases not involving eminent domain, the Court generally has distinguished between two forms of government action—physical occupation (which is a *per se* taking) and all other forms of economic regulation (which constitute a taking only if the regulation renders the property essentially valueless or otherwise fails substantially to serve any legitimate public purpose). Compare *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), with *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). This Court has been careful to limit the *per se* takings doctrine to cases of actual physical intrusion by the government and has never applied this doctrine to mere economic regulation. Specifically, in the area of landlord-tenant relations, this Court has held that "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto*, 458 U.S. at 440; see also *Pennell* v. *City of San Jose*, 485 U.S. 1, 12 n.6 (1988) ("'statutes regulating the economic relations of landlords and tenants are not *per se* takings'") (quoting *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987)); *Block* v. *Hirsh*, 256 U.S. 135, 155 (1921) (under police power, a landlord's "property rights may be cut down, and to that extent taken, without pay").

Seeking to escape the obvious import of this Court's rent control decisions, petitioners argue that the Ordinance effects a government-authorized permanent physical occupation of their property. Thus, even though the Ordinance on its face merely regulates monopoly rents, petitioners assert that, under *Loretto*, it deprives them of a

"permanent possessory interest in their land." Brief of Petitioners at 10.

Petitioners' attempt to recast Escondido's rent regulation as a permanent physical occupation of their property is untenable. *Loretto*'s narrow holding has no application to this Ordinance which merely regulates the amount of rent park owners—who voluntarily rent their property and who are free to change the use of their property at any time—may charge. To hold otherwise would convert the heretofore useful takings concept of "physical occupation" into an utterly meaningless "metaphysical occupation" theory. Neither case law nor common sense supports this result.

Moreover, the Ordinance does not deprive petitioners of any legally recognized property interest. Stripped of petitioners' unfounded assumptions and flatly erroneous assertions, it is plain that all petitioners have lost is their ability to extract excessive rents from their homeowner-tenants—a property use the City indisputably can prohibit.

1. *Loretto*'s Narrow Holding Is Inapplicable To Legislation That Regulates The Rates Landlords Charge For Property They Voluntarily Agree To Rent.

In *Loretto*, the petitioner landlord claimed that a New York statute that required her to permit a cable television company to install cable wires and related fixtures on her property effected a taking of her property for which compensation was due. Although the cable facilities themselves were not large, "[t]he installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall." 458 U.S. at 438. The state courts upheld the statute, concluding that it did not interfere with the landlord's investment-backed expectations or have an excessive economic impact on her property and that it was justified by the educational and community benefits that

cable television made possible. Accepting the validity of the asserted benefits, this Court nevertheless reversed, holding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve." *Id.* at 426.

In announcing this rule, the Court drew on a series of cases involving physical intrusions on private property that "reache[d] the extreme form of a permanent physical occupation." *Id.* These intrusions included governmentally authorized permanent flooding of land (*id.* at 427-28), governmentally compelled acceptance of "permanent . . . installations [such] as telegraph and telephone lines, rails, and underground pipes or wires" (*id.* at 430), and governmentally authorized frequent, low-altitude flights that constituted a "'direct invasion of [a landowner's] domain.'" *Id.* at 431 (quoting *United States* v. *Causby*, 328 U.S. 256, 265-66 (1946)). Such permanent physical occupations, the Court explained, amounted to *per se* compensable takings because they destroyed each of the three essential rights in property: 1) the right to possess the occupied property and to exclude others; 2) the right to make nonpossessory use of the property; and 3) the right to dispose of the property. 458 U.S. at 435-36.

The Court emphasized that its holding was "very narrow," and did not call into question the "substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property." *Id.* at 441 (emphasis in original). Of particular importance here, the Court explained that its rule would not upset the "government's power to adjust landlord-tenant relationships." *Id.* at 440. Indeed, citing its decisions upholding rent control measures in *Bowles* v. *Willingham*, 321 U.S. 503 (1944), *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922), and *Block*, the Court "affirmed that States have broad power to regulate . . . the landlord-tenant relationship . . . without paying compensation for all economic injuries that such regulation entails." *Id.* Unlike the New York statute before it, the

Court pointed out, "[i]n none of these [earlier] cases . . . did the government authorize the permanent occupation of the landlord's property *by a third party*." *Id.* (emphasis added). As long as state regulations "do not require the landlord to suffer the physical occupation of a portion of his building *by a third party*, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity." *Id.* (emphasis added).

Notwithstanding petitioners' mantra-like insistence that this case involves a physical occupation, *Loretto*'s narrow holding has nothing to do with this case. All of the critical elements of a permanent physical occupation that this Court identified in *Loretto* are absent here. Indeed, the Escondido Ordinance, both standing alone and in conjunction with the California Mobilehome Residency Law, lacks the most fundamental of these elements—*i.e.*, governmentally *compelled* occupation. Petitioners' only complaint is that their property is being occupied *by their own homeowner-tenants*. Nothing in either the Escondido Ordinance or the California law compels park owners such as petitioners to rent their property to mobilehome owners, or prevents them from ceasing to rent their property should they wish to do so. The fact that homeowners occupy petitioners' property is a consequence of petitioners' own voluntary decision to hold their premises out for rent to the public and their subsequent decision to continue to do so.[25]

This lack of governmental compulsion is fatal to petitioners' physical occupation claim. In *Loretto* itself, this

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[25] Petitioners' oft-repeated assertion that the Escondido Ordinance confers on homeowners the right to occupy petitioners' land "in perpetuity" or "permanently" (see Brief for Petitioner at 6, 9, 11, 13, 14), is demonstrably wrong. As the City has previously explained, (*see supra* pp. 10 & n.18), petitioners may remove their property from the rental market (and thereby terminate the occupancies of their tenants) at any time they see fit, subject only to the requirements of state law (*see* Cal. Civ. Code § 798.56(g) (Deering 1990)), and other normal zoning requirements that attend any conversion in use of property.

Court took pains to point out that the constitutionally significant invasion was not the occupancy of the landlord's tenants (whom the landlord had invited onto her premises), but the intrusion by a "third party" (the cable company) who was in all respects a complete stranger to the landlord-tenant relationship, and in no respect an invitee. 458 U.S. at 439.

This Court has since explained that "[t]his element of *required acquiescence*," which lies "at the heart of the concept of occupation," is entirely lacking in the landlord-tenant relationship. *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987) (emphasis added). In *Florida Power*, the Court rejected the argument that "it is a taking under *Loretto* for a tenant invited to lease at [one] rent . . . to remain at [a different] regulated rent." *Id.* Rather, the Court explained, "it is the invitation, not the rent, that makes the difference. The line which separates [rent control] cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Id.* at 252-53. See also *Kaiser Aetna*, 444 U.S. at 179-80 (finding taking where government authorized third parties to use marina that owner had consistently treated as private property).

Nor does it matter that, having chosen to hold their property out for rent, petitioners' right to exclude or refrain from renting to individual homeowners is restricted. Putting aside for the moment the fact that *all* of these restrictions are imposed by a statute (the California Mobilehome Residency Law) that petitioners have not even challenged in this litigation,[26] this Court's cases make it clear that, when owners open their property to the public or hold it out for public accommodation, their previously unfettered discretion to exclude others must yield to the State's authority to prevent social and economic evils such as discrimination or unfair competitive gain. Thus, in *Loretto* itself, the Court approved, as fully consistent with its permanent physical occupation holding,

[26] *See infra* pp. 29-30.

decisions upholding statutes that restricted landlords' rights to exclude tenants who continue to occupy rented premises beyond the expiration of their leases (see 458 U.S. at 440 (citing *Block* and *Edgar A. Levy Leasing Co.*)), or that prevent property owners from excluding individuals on the basis of race, gender, or national origin from the owners' places of public accommodation. *Id.* (citing *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964));[27] see also *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 82-85 (1980) (state constitution may require private shopping center to permit political expression on its premises). More recently, this Court has dismissed for want of a substantial federal question challenges brought under the Taking Clause to statutes, like the California law here, that required park owners to permit mobilehomes to remain on-site after sale. See *Eamiello* v. *Liberty Mobile Home Sales, Inc.*, 546 A.2d 805 (Conn. 1988), *appeal dismissed*, 489 U.S. 1002 (1989); *Thompson* v. *Merlino Enters., Inc.*, 545 A.2d 1094 (Conn. 1988), *appeal dismissed*, 488 U.S. 1024 (1989).

This Court's cases make clear that the essential right to exclude others inheres only in "property *reserved by its owner for private use*." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831 (1987) (emphasis added). Here, petitioners have not reserved their property for private use, but instead have held it out to the general public for rent. They remain free, moreover, to reclaim their right to exclude by removing their property from

[27] Petitioners and their supporting *amici* make much of this Court's observation in *Loretto* that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. This comment, however, can only be understood as referring to physical occupations by third parties who are not tenants. This is clear not only from the Court's repeated references to third party occupations in the text (*see id.* at 440), but by its further explanation, in the very footnote petitioners cite, that "[t]he right of a property owner to exclude *a stranger's* physical occupation of his land cannot be so easily manipulated." *Id.* at 439 n.17 (emphasis added).

the rental market. Unless and until they do so, any loss of that right is attributable to their own choices, not to any compulsion by Escondido.[28]

Similarly, Escondido has not stripped petitioners of their right "to control the use of the[ir] property" or to make "nonpossessory use of the property." *Loretto*, 458 U.S. at 436. On the contrary, petitioners are currently obtaining income from their property by renting mobilehome spaces,[29] and they retain the authority to decide whether the property will continue to be used for this or some other purpose, subject only to state notice requirements and whatever limitations generally applicable zoning laws may impose. Cf. *United States* v. *Causby*, 328 U.S. 256, 259 (1946) (government's invasion of private property caused destruction of owner's commercial chicken farm); *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 181 (1871) (permanent flooding of land destroyed its usefulness); *National Bd. of YMCA* v. *United States*, 395 U.S. 85, 92 (1969) ("Ordinarily, of course, governmental occupation of private property deprives the private owner of his use of the property"). Nor has petitioners' property been so emptied of value that, as a practical matter, they cannot dispose of it. Cf. *Loretto*, 458 U.S. at 436. Petitioners remain free to sell the land as income-producing rental property or to sell it to a purchaser who wishes to make some other use of the property. Accordingly, there is absolutely no merit to petitioners' mystifying assertion that the Escondido Ordinance deprives them of "their rights to enjoy any future appreciation of their lands' value, and their rights to leave their property to their heirs." Brief for Petitioners at 18. In fact, they have lost neither of these rights.

[28] Contrary to the Ninth Circuit's suggestion in *Azul Pacifico, Inc.* v. *City of Los Angeles*, 1991 WL 224528 (9th Cir. Nov. 1, 1991), this Court did not conclude in *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 251 n.6 (1987), that restrictions on a landlord's ability to enter into or to terminate leases constitute a physical occupation. First, the Court simply reserved judgment on *Loretto*'s applicability to any future FCC order that "required utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements." *Id.* More important, the Court's comment clearly concerned the takings implications of requiring utilities to enter or remain in the business of renting pole space, not the implications of simply regulating leases where utilities choose to offer pole space for rent. Indeed, the Court's comment was made in connection with Florida Power's allegation that it was powerless to exit the pole rental business altogether. *See id.*

[29] In light of this undisputed, and indisputable, fact, respondent is at a complete loss to understand petitioners' claim that the Ordinance has taken "their rights to receive rents." Brief for Petitioners at 18. In fact, during the pendency of this case, the Rental Review Board *increased* petitioners' rents. *See supra* p. 4 & n.5.

In short, Escondido has not "chop[ped] through [petitioners'] bundle [of property rights], taking a slice of every strand." *Loretto*, 458 U.S. at 435. Instead, the complete absence of any governmental compulsion concerning the uses to which petitioners' property is or may be put, and petitioners' extensive dominion and control over that property, demonstrate that Escondido has simply and reasonably regulated, not appropriated, petitioners' mobilehome parks. Under *Loretto*, Escondido's regulation of petitioners' rent is therefore not a *per se* taking.

2. Petitioners Have Not Been Deprived of Any Legally Protected Property Interest.

Petitioners attempt to buttress their physical occupation claim by pointing to the alleged "premium" that homeowners in rent-controlled parks are able to realize on the sale of their mobilehomes. According to petitioners, this premium reflects the value of the "property interest" that the Ordinance has taken from them and bestowed on their "tenants." This "property interest," petitioners claim, is "akin to a permanent statutory leasehold" that confers on the owner "[t]he right to occupy land permanently at below market rent." Brief for Petitioners at 14.

This contention, which has moved panels in the Third and Ninth Circuits,[30] is fundamentally flawed. The al-

[30] *See Azul Pacifico*, 1991 WL 224528; *Pinewood Estates* v. *Barnegat Township Leveling Bd.*, 898 F.2d 347 (3d Cir. 1990);

leged premium homeowners realize on the sale of mobilehomes in rent-controlled parks simply reflects the value to the purchasers of the protection the Ordinance provides against excessive rents.[31] Petitioners could not capture this alleged premium by selling an identifiably discrete interest in their property; they could only do so by charging the excessive rents that the Ordinance lawfully prohibits.[32]

a. Petitioners Have Lost No State-Recognized "Property Interest" That They Could Convey.

If, as petitioners claim, the Escondido Ordinance took an identifiable property interest from them and transferred it to their "tenants," then presumably repeal of the Ordinance would return this interest to petitioners. Indeed, petitioners claim that, "[b]ut for the Escondido Ordinance, [p]etitioners would have retained or could have sold such interests at the market price." *Id.* at 10. They are tellingly silent, however, concerning precisely how they would go about making such sales.

In fact, if Escondido repealed its Ordinance, purchasers of mobilehomes who, at present, may pay a "premium" to acquire a home that enjoys rent protection would not pay an equivalent premium to petitioners. Rather, purchasers would simply pay less to the departing homeowner for his or her mobilehome. Petitioners, in turn, would be able to capture an amount approximating the homeowner's premium by charging the new homeowner excessive rents.[33] Raising rents does not involve a sale of a separate interest in property at all but simply involves the use of property.

Thus, all that has been taken from petitioners is their ability to profit from the shortage of mobilehome spaces in Escondido and the rent leverage they possess due to the high cost of moving a "mobile" home. Cf. *Block* v. *Hirsh*, 256 U.S. 135, 157 (1921) (upholding law providing "reasonable rent" while depriving landlords of opportunity to "profit[] by the sudden influx of people to Washington"). This is not an interest that petitioners could "sell" on the open market in any meaningful sense of that phrase. Rather, it is an economic advantage that they derived from the *use* of their property and is therefore fairly regulated by the City.

b. The Premium Petitioners Seek To Capture Is Nothing More Than The Unfair Profits The Escondido Ordinance Legitimately Denies Them.

Even assuming the Escondido Ordinance, operating in conjunction with the eviction protections of the California Mobilehome Residency Law, divests petitioners of a discrete and marketable property interest—and respondent submits that it plainly does not—this interest is simply not one protected by the Taking Clause. This Court has explained that

> not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.

Hall v. *City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), *cert denied*, 485 U.S. 940 (1988).

[31] *See, e.g., Casella* v. *City of Morgan Hill*, 230 Cal. App.3d 43, 54, 280 Cal. Rptr. 876 (Cal. Ct. App. 1991) (increase in sales price may simply reflect artificially low price caused by excessive rents charged prior to enactment of rent control), *petition for cert. filed*, No. 91-361 (Oct. 15, 1991).

[32] Petitioners' assertion that the Ordinance allows "tenants" to rent mobilehome spaces at "below market rent" (*see* Brief for Petitioners at 9) misleadingly assumes that the rental rates prevailing in Escondido before the Ordinance were the product of an open and competitive market. In fact, just the opposite was true: scarcity of available spaces and the immobility of mobilehomes enabled park owners to charge excessive rents.

[33] In the absence of the Mobilehome Residency Law, park owners could also capture all or part of the premium in two other ways: by forcing departing homeowners to pay an exit fee in exchange for the owner's acceptance of the purchasing tenant or by forcing new homeowners to pay an entrance fee. Indeed, these practices were common before California prohibited them.

Kaiser Aetna v. *United States*, 444 U.S. 164, 178 (1979) (quoting *United States* v. *Willow River Co.*, 324 U.S. 499, 502 (1945)); see also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1003 (1984) ("intangible property rights *protected by state law* are deserving of the protection of the Taking Clause") (emphasis added). Far from enjoying the backing and protection of state law, the "economic advantage" for which petitioners seek just compensation is an advantage state law may legitimately prohibit.

By limiting the grounds upon which park owners can terminate or refuse to enter into space leases, and by regulating the rents owners can charge for such leases, the California and Escondido laws are designed to prevent petitioners from extracting monopolistic rents that the shortage of mobilehome rental spaces and the immobility of mobilehomes themselves would otherwise make possible. There can be no serious dispute that the desire to extract such rents is not an economic advantage which "ha[s] the law back of it." *Kaiser Aetna*, 444 U.S. at 178. Indeed, state and federal codes abound with statutes designed to protect consumers from monopolistic pricing. Moreover, such pricing is made possible here in part by zoning laws in which petitioners have no legally protected interest. See *Eamiello*, 546 A.2d at 820 (state that created site value by regulatory scarcity (zoning) can constitutionally grant sales premium to homeowner rather than park owner).

The mere fact that departing homeowners may be able to realize a monetary benefit from a restriction on a park owner's ability to charge excessive rents does not convert that restriction into a physical occupation of petitioners' property or an appropriation of a legally protected property interest. Takings are measured in terms of the property owner's loss, not the government's (or its beneficiaries') gain. *United States* v. *Virginia Elec. & Power Co.*, 365 U.S. 624, 635 (1961); *Boston Chamber of Commerce* v. *City of Boston*, 217 U.S. 189, 195 (1910). Here, the "interest" petitioners have lost—the right to use their property to profit from a shortage of mobilehome rental

spaces and the high cost of moving—is simply not a legally protected interest, and hence its loss is not compensable as a *per se* taking under the Fifth Amendment. For purposes of determining whether a physical occupation has occurred, therefore, the homeowner's alleged ability to "monetize" a benefit created by Escondido's regulation of rental rates is simply irrelevant.

3. This Court Should Not Expand *Loretto*'s Narrow Holding to Encompass Economic Regulation Of Property Voluntarily Held Out For Rent.

This Court has consistently rejected imaginative efforts to recast state and federal regulatory measures as physical occupations for which compensation is automatically due. See *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 n.8 (1989); *Florida Power*, 480 U.S. at 250-53; *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 221-24 (1986); see also *Nollan*, 483 U.S. at 841 (analyzing zoning permit condition that required "the actual conveyance of property" as regulatory taking). This case demonstrates the importance and wisdom of maintaining a clear line of demarcation between permanent physical occupations on the one hand, and nonpossessory governmental activity that affects the value of property on the other hand. Petitioners are at obvious pains to portray their claim as a narrow one: they insist that they are not challenging rent controls generally (see Brief for Petitioners at 7, 10); and, to further disguise the sweep of their legal theory, they have not challenged the California law that clearly undergirds their physical occupation claim. The enormous expansion of *Loretto* that acceptance of their claim would work, however, cannot be so easily concealed.

Petitioners' claim depends vitally on the eviction protections that California law affords mobilehome residents. Without these restrictions on petitioners' ability to terminate or refuse to enter into leases, absolutely none of the supposed "appropriation" of petitioners' property could occur. There are numerous such restrictions imposed by state and municipal laws throughout the country, as well

as by various federal laws that limit the rights of owners generally, and landlords in particular, to exclude others from their property. See Baar, *Guidelines for Drafting Rent Control Laws: Lessons of a Decade*, 35 Rutgers L. Rev. 723, 833 (1983) (citing examples of typical "good cause" eviction laws). If this Court sustains petitioners' physical occupation claim here, it opens all of these laws and a variety of others[34] to challenge under the Taking Clause, and casts doubt on the heretofore unquestioned authority of states to regulate the terms and conditions under which property can be held out to the public.

The line between such laws and those that effect permanent physical occupations is clear. States may not compel owners to open "property reserved . . . for private use" to the general public (*Nollan*, 483 U.S. at 831); to require owners, as a condition of the right to rent property, to permit physical occupations by non-tenant, third party strangers (*Loretto*, 458 U.S. at 439 n.17); or, arguably, to require owners to continue to make their property available for rental use once they begin to do so. *Florida Power*, 480 U.S. at 251 n.6; but cf. *Fresh Pond Shopping Ctr.* v. *Callahan*, 464 U.S. 875 (1983) (dismissing for want of substantial federal question challenge brought to statute that effectively prevented owner from removing property from rental market).[35] Once owners cross this line and voluntarily hold their property out for rent, however, states may regulate the terms and conditions upon which such owners can refuse to enter into or terminate leases, so long as the owners are permitted to earn a just and reasonable return on their investment. This Court should reaffirm this unambiguous—and appropriate—line of demarcation here.

[34] *See Brief Amici Curiae of the National Trust for Historic Preservation in the United States in Support of Respondent.*

[35] *See also Nash* v. *City of Santa Monica*, 688 P.2d 894 (Cal. 1984) (no substantial federal question raised by requirement that pre-demolition removal permit be obtained before landlord could remove rental units from housing market), *appeal dismissed*, 470 U.S. 1046 (1985).

What makes the petitioners' argument to eliminate the bright-line standard for physical occupation particularly pernicious is the *per se* consequence that flows from that label. Instead of being able to demonstrate that a particular regulation was either justified by important governmental interests or that the impact on the property was not significant, the only question will be what compensation is just. Compare *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470 (1987). This Court has steadfastly and wisely refused to expand the use of a *per se* approach in reviewing government regulation under the Taking Clause. Petitioners have presented no compelling argument for why it should abandon that course now. To the extent the Court concludes that the Fifth Amendment's protections against takings have received a crabbed interpretation, the solution is not to expand what constitutes a physical occupation but rather to relax the standards for what constitutes a regulatory taking under *Penn Central*. For the reasons discussed below, the latter issue is not before the Court in this case and, in any event, Escondido's regulatory scheme in no way goes "too far." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922).

4. Any Unconstitutional Restrictions On Petitioners' Rights Result From The Operation Of The California Mobilehome Residency Law, Not The Escondido Ordinance.

Finally, petitioners' "physical occupation" claim against the City of Escondido must fail for the simple reason that it is the California Mobilehome Residency Law, not the Escondido Ordinance, that restricts a park owner's right to evict homeowners and to select the next homeowner to occupy the spaces he holds out for rent. The Escondido Ordinance merely regulates rents—it does not in any way restrict other rights of park owners.[36] Thus,

[36] Petitioners' implication that the Escondido Ordinance itself restricts the rights of park owners to exclude or refrain from renting to individual homeowners does not withstand scrutiny. On

if petitioners' property has been occupied, it has been occupied by the State, not the City. Accordingly, the State should have been named as a defendant in this suit and the State should pay whatever compensation is warranted if this Court were to hold that petitioners' property has been taken.[37]

B. The Escondido Mobilehome Rent Protection Ordinance Does Not Effect A Regulatory Taking Of Petitioners' Property.

Implicitly acknowledging the untenable nature of their physical occupation claim, petitioners in their brief to this Court argue for the first time that the Escondido Ordinance is a compensable—indeed, an impermissible—regulatory taking of their property. This

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its face the termination provisions in the Ordinance apply only to those relatively few tenancies which are "not subject to the provisions of the Mobilehome Residency Law" (*see* Ordinance § 6; JA 28-29), *i.e.*, subleases of mobilehomes from homeowners (rarely permitted by park owners) or rental of mobilehomes owned directly by the park owner. In neither case is the "tenant" a "homeowner" and therefore the Ordinance's restrictions cannot give rise to the alleged premium obtained by "homeowners" on the sale of their mobile homes.

[37] Petitioners' "physical occupation" claim may also be unripe. Petitioners argue that among the bundle of rights constituting the "permanent possessory interest" that the Ordinance purportedly transfers to their "tenants" are "the right to pay a rent below market rent in perpetuity," and "the right effectively to set and collect the next tenant's rent by charging a premium on the sale of the mobilehome coach." Brief for Petitioners at 9-10. The magnitude, and indeed the very existence, of these "rights" apparently depends on the level of rent that petitioners are permitted to charge. Hence petitioners' claims that these "rights" have been taken would seem to be premature until the level of rent has been established by the Rental Review Board. *See Pennell* v. *City of San Jose*, 485 U.S. 1, 11 n.5 (1988) (declining to address appellants' contention that combination of lower rents and restrictions on landlord's power to evict tenants contained in San Jose ordinance amounted to physical occupation of landlords' property, stating that this contention too "is premised on a hearing officer's actually granting a lower rent to a hardship tenant"). *See infra* pp. 34-35 (discussing ripeness in connection with regulatory takings claim).

claim fails for at least three separate reasons. First, petitioners are precluded from raising a "regulatory taking" challenge in this Court. They did not raise or litigate a facial regulatory taking claim below and they cannot now rely on such a claim as a ground for reversal. Moreover, having completely failed to avail themselves of the procedure for obtaining rent increases, any "as applied" regulatory taking claim they might raise is plainly unripe. Second, even if a facial claim is properly before this Court, it necessarily fails because petitioners have not been deprived of all economic use of their property. Third, the Escondido Ordinance does substantially advance several legitimate state interests and thus easily passes muster under *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987).

1. Petitioners' Regulatory Taking Claim Is Not Properly Before This Court.

Petitioners claim that the Escondido Ordinance has taken their property "under the criteria of *Penn Central*" because the "economic effect of [the Ordinance], as well as [its] interference with distinct, investment-backed expectations . . . [is] severe." Brief for Petitioners at 17. It is elemental that, in reviewing decisions of state courts, this Court lacks jurisdiction to decide federal questions that were neither litigated nor decided below. *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438-39 (1969). Because petitioners never made any attempt to litigate a *Penn Central*, or "regulatory taking," challenge below, and because the state courts did not address such a challenge, petitioners are precluded from raising this alternative claim here. Moreover, because petitioners did not seek rent increases from the Rental Review Board prior to instituting this suit, their regulatory taking claim is unripe. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172 (1985).

a. Petitioners' *Penn Central* Claim Was Neither Litigated Nor Decided Below.

In their submission to this Court, petitioners describe the allegations of their complaint as "indistinguishable from the claims sustained in *Hall* v. *Santa Barbara*[,] *Pinewood Estates* v. *Barnegat Township Leveling Bd.*[,] and . . . *Azul Pacifico, Inc.* v. *Los Angeles*." Brief for Petitioners at 5-6 (citations omitted). The claims in all of these cases were predicated on a physical occupation theory. Indeed, petitioners accurately describe their claim as alleging "that the Escondido Ordinance, operating in conjunction with the California Mobilehome Residency Law, transfers to their tenants a valuable possessory interest in the realty, akin to a [statutory] leasehold, without compensation." *Id.*[38]

In connection with their taking claim, moreover, petitioners argued below only that the Ninth Circuit's decision in *Hall* should be given controlling effect (see Appellants' Opening Brief at 5-12) and that the Ordinance effected a taking of their right "to enter into a long-term lease at a reduced rate with an incoming tenant" and thereby enabled the outgoing tenant "to appropriate the entire appreciated value of the pad on which his mobilehome is located." *Id.* at 14. In connection with this *Hall*-based physical occupation claim, they cited *Penn Central* only once—for the proposition that taking claims generally entail *ad hoc* factual inquiries. *Id.*

In addition, a facial regulatory taking challenge requires a credible allegation that the law in question "denies an owner economically viable use of his land." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480

[38] While their complaint makes a single passing reference to a deprivation of "all use and occupancy of [their] property" (Complaint ¶ 6; JA 3), petitioners do not suggest that they intended this cryptic assertion to raise either a "facial" or an "as applied" regulatory taking challenge, or that they pursued either such claim below. Indeed, respondent's motion to strike this allegation was granted (Pet. App. C43-44), and petitioners did not appeal that order. *See* Notice of Appeal, JA 35.

U.S. 470, 495 (1987) (citations and internal quotation marks omitted). Petitioners, however, expressly disavowed such an effect here, arguing instead that the "[g]overnment *need not* deprive an owner of all use of his property to infringe the just compensation clause of the Fifth Amendment." Appellant's Opening Brief at 13. This argument only make sense if petitioners were asserting a *per se* taking claim.

Not surprisingly, given petitioners' exclusive reliance on the physical occupation theory espoused in *Hall*, the Court of Appeal did not discuss any regulatory taking claim or *Penn Central*'s multifactor test. Instead, the Court of Appeal's opinion is devoted almost entirely to a discussion of why *Hall* was wrongly decided. See Pet. App. A15-27. Moreover, in their petition to this Court, petitioners focused exclusively on their *Hall* claim. Thus, noting that "[t]wo federal courts of appeal have held that the transfer of a premium value to a departing mobilehome tenant . . . constitute[s] an impermissible taking," they posed only the question whether it was error "for the state appellate court to disregard the[se] rulings and hold that there was no taking under the fifth and fourteenth amendments[.]" Pet. i.

Under these circumstances, this Court lacks jurisdiction to hear any regulatory taking challenge petitioners now proffer. Petitioners did not litigate any such challenge below and thus failed to afford the state courts an opportunity to address the constitutionality of the Ordinance in light of such a challenge. See *Cardinale*, 394 U.S. at 439. In addition, they failed to present the *Penn Central* issue in their petition to this Court; indeed *Penn Central* was nowhere cited in their petition for *certiorari*. See Supreme Court Rule 14.1(a) ("[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court"). Accordingly, this Court cannot entertain petitioners' regulatory taking claim.

b. Petitioners' Regulatory Taking Claim Is Unripe.

In *Williamson County Regional Planning Comm'n*, 473 U.S. 172, this Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." Accordingly, this Court determined that Hamilton Bank's claim under 42 U.S.C. § 1983 that the Williamson Planning Commission had "taken" its property without just compensation through the application of certain zoning laws was "premature" because the Bank had failed to seek a variance prior to instituting suit. *Id.* at 186-88.

This Court explained that "takings" claims are premature until the government has taken final action because, prior to that time, the government may correct any constitutional improprieties in its regulatory scheme. "'If [property owners] were to seek administrative relief under [the procedures provided by the State], a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions.'" *Id.* at 187 (quoting *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981)). Moreover, this Court stated that it

> consistently has indicated that among the factors of particular significance in [a takings] inquiry are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations. . . . Those factors simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular [property] in question.

Id. at 190-91 (citations omitted).

Since *Williamson*, this Court has on at least two occasions declined to address the merits of "takings" claims

in cases in which the government had not yet reached a final decision concerning the application of its regulations to the property at issue. In *Pennell* v. *City of San Jose*, 485 U.S. 1 (1988), appellants contended that San Jose's rent control ordinance, which allowed a hearing officer to consider the "hardship to a tenant" when determining whether to approve a proposed rent increase, was *facially* unconstitutional. This Court declared the claim premature because San Jose had made no authoritative determination as to how the regulations would be applied, *i.e.*, "there [was] simply no evidence that the 'tenant hardship clause' ha[d] in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance." *Id.* at 9-10. Stressing the importance of addressing Taking Clause challenges only in concrete factual contexts, the Court added that

> we have found it particularly important in takings cases to adhere to our admonition that 'the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary.' *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-95 (1981).

Id. at 10. See also *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 349-50 (1986).

Prior to this lawsuit, petitioners did not seek a rent increase from the Rental Review Board, and thus no final decision concerning the application of the rent control Ordinance to petitioners' property is before this Court. By failing to seek relief in the manner provided by the Ordinance, petitioners failed to provide the City with an opportunity to negotiate an agreement—*viz.*, an acceptable rent increase—that might obviate any perceived constitutional deficiencies in the City's rent control scheme. Moreover, without knowing what rents the City will permit petitioners to charge, this Court can do no more than speculate about the economic impact—if any—of the Ordinance on petitioners' property or the extent to

which it interferes—if at all—with petitioners' investment-backed expectations. Consequently, petitioners' *Penn Central* challenge is entirely unripe.

2. Petitioners' Regulatory Taking Claim Is In Any Event Meritless.

Even if petitioners' regulatory taking claim were otherwise properly before this Court, the claim is entirely without merit. On its face,[39] the Ordinance does not deprive petitioners of all economically viable use of their property. There can be no serious dispute, moreover, that the Ordinance substantially advances Escondido's legitimate goal of protecting the many current and future mobilehome tenants whose well-being would otherwise be threatened by uncontrolled rent increases.

a. Escondido's Ordinance Does Not Deprive Petitioners Of All Economic Use Of Their Property.

" 'The test to be applied in considering [a] facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land." ' " *Keystone*, 480 U.S. at 495 (quoting *Hodel*, 452 U.S. at 295-96 (quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980))). While any litigant would "face an uphill battle in making a facial attack" on legislation (*id.*), petitioners' assault clearly has no merit. Indeed, as the Court of Appeal noted, because petitioners "never alleg[d] [that] the Escondido ordinance . . . denies them fair and reasonable rents[,]" it must be "assume[d that] the rents provided for by the ordinance are fair." Pet. App. A14. Compare *Keystone*, 480 U.S. at 496 ("petitioners have never claimed that their mining operations . . . have been unprofitable since the [law under challenge] was passed"). On these facts, petitioners' facial challenge must be rejected as a matter of law.

[39] Because, as just noted, petitioners did not seek a rent increase before instituting this litigation, in this section the City addresses only petitioners' facial *Penn Central* challenge.

Petitioners nevertheless contend that the Ordinance deprives them of their rights to receive rents from, or to realize appreciation in, their property, as well as their right to bequeath their property to their heirs. Brief for Petitioners at 18. However, petitioners can and do receive rents from their property; they can possess it by withdrawing it from the rental market; they can realize any appreciation in their property by selling it;[40] and they can pass it to their heirs either as mobilehome rental property or, if they withdraw it from the rental market first, as property unencumbered by any homeowner protection restrictions. See *supra* p. 10.

Petitioners' claim can only be understood, therefore, as referring to the rights they have allegedly lost in the discrete "property interest" that they claim the Ordinance has taken from them and transferred to their homeowner-tenants. But that is not a separate, legally protected interest in property. Rather, it is only the right to use property to extract the excessive rents that Escondido's mobilehome space shortage and the immobility of mobilehomes otherwise make possible.

Even assuming, however, that the right to use their property in this manner was a discrete and legally protected "property interest," their facial regulatory takings claim still fails. As this Court has explained:

> 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights *in the parcel as a whole*.

Keystone, 480 U.S. at 497 (quoting *Penn Central*, 438 U.S. at 130-31) (emphasis in original). Thus, "where an

[40] Petitioners' implication that mobilehome parks subject to rent control do not appreciate is patently false. See Los Angeles Study at iv ("[m]obile home park values have risen substantially since owners' purchase").

owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id.* (internal citation omitted). This standard entirely undermines petitioners' facial challenge: they are continuing to rent their property (and in fact the Yee petitioners have obtained rent increases for both of their parks),[41] and remain free to sell their property (and in fact other petitioners did sell one park) or put it to alternative uses should they wish to do so.

b. On Its Face, The Ordinance Substantially Advances Legitimate State Interests.

Relying on *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987), petitioners argue that Escondido's Ordinance effects a compensable taking because it fails substantially to advance a legitimate governmental interest. According to petitioners, departing homeowners are able to capture the full value of the rent protection in the premium that attaches to their mobilehomes. Thus, subsequent purchasers receive no protection from the Ordinance at all, because they pay controlled rents plus a sales premium which equals "the capitalized value of the difference between controlled rent and market rent." Brief for Petitioners at 27. As a result, petitioners conclude, "[t]he only goal accomplished by the Ordinance is a one-time wealth transfer from property owners to tenants in residence at the time of the election in June 1988." *Id.* In fact, the Ordinance substantially advances the City's legitimate interest in protecting *both* current *and* future homeowners. Either interest, standing alone, is sufficient

[41] Petitioners' suggestion that the controlled rents they receive "decline in constant dollars because of inflation" (Brief for Petitioners at 20) and that the resulting decline in the value of their property "is progressive and permanent" (*id.* at 22) simply ignores the fact that they can obtain rent increases and have in fact done so. Indeed, one of the factors the Rental Review Board *must* weigh when considering a rent increase application is any "[c]hange[] in the Consumer Price Index for All Urban Consumers in San Diego Metropolitan Area." Ordinance § 4(g)(1); JA 26.

to sustain the Ordinance. Petitioners' contention that future homeowners will not benefit from the Ordinance is thus both incorrect and irrelevant as a matter of law.

i. Escondido's Ordinance Protects Current Homeowners From Excessive Rent Increases And Protects The Investment In Their Homes.

The Ordinance substantially advances Escondido's perfectly legitimate goal of protecting *current* homeowners from escalating rent increases. As discussed, because of the complementary relationship between space rents and the value of mobilehomes, these homeowners have a significant investment in their homes that is jeopardized by a park owner's unfettered discretion to increase rents. As the Ninth Circuit recognized, the close nexus between the state's entirely permissible interest in protecting the investments of current homeowners and the legislative means chosen to accomplish it is sufficient, standing alone, to dispose of the *Nollan* challenge that petitioners advance. See *Azul Pacifico* v. *City of Los Angeles*, 1991 WL 224528, at *6 (9th Cir. Nov. 1, 1991) ("the ordinance does protect existing tenants from being forced to sell their coaches at distress sale prices in the event the landlords were to set rents for new tenants so high that no one would want to buy the coach"). That purpose, by itself, is sufficient to sustain the statute.

Petitioners nevertheless insist that the Ordinance is unconstitutional because it sweeps too broadly. Arguing that the danger of untoward rent increases whenever a mobilehome is sold is "illusory," petitioners contend that Escondido can have no interest in preventing these increases, and thus must provide for "decontrol" at the time the home is sold.

At the outset, it is important to recognize the unwarranted degree of judicial intrusion into state legislative judgments that petitioners' expansive view of *Nollan* entails. Petitioners implicitly acknowledge that regulating rents *during* the period a homeowner remains in a mobilehome substantially advances the City's legitimate

interests. Brief for Petitioners at 26-28. They cannot and do not deny, moreover, that the Ordinance permits park owners to seek rent increases at the time of a mobilehome's sale or at any other time a park owner believes an increase is warranted.[42] Reduced to its essentials, therefore, petitioners' *Nollan* argument boils down to the proposition that the Federal Constitution *requires* states to permit unrestricted rent increases whenever a mobilehome owner sells his home on site, and *forbids* states from authorizing rent increases on a case-by-case basis. The City submits that *Nollan* cannot and should not be read to incorporate into taking jurisprudence the strict scrutiny and least restrictive alternative standards upon which petitioners' claim necessarily depends.

Certainly the voters of Escondido could reasonably conclude that mobilehome park owners could do more harm to the public interest by charging excessive rents to essentially captive homeowners than individual homeowners could do by requesting excessive prices for their homes. In any event, the choice of solutions belongs to the City. The decision whether to regulate the buyer-seller relationship is a legislative choice with which the courts should not interfere. Nothing authorizes this Court to substitute its judgment for that of the City as to how best to protect current homeowners' significant investment in their homes and to protect mobilehome living as an affordable housing option.

ii. The Ordinance Protects Future Homeowners From Excessive Rent Increases And Will Protect Their Mobilehome Investments.

Even if the constitutionality of the Ordinance did turn on the narrow question of whether it benefits *future*

[42] Although petitioners imply in their Complaint that the Ordinance resulted in a "fixed reduced rent" (Complaint ¶ 8; JA 4), after the above language was stricken by the Court Order granting Motion to Strike, etc., Pet. App. C43-44, petitioners never appealed from that portion of the Order. *See* Notice of Appeal, JA 35.

homeowners, the Ordinance would withstand scrutiny under the *Nollan* standard because it substantially advances the City's interest in protecting these individuals. The Ordinance protects these homeowners, just as it protects current homeowners, by preventing park owners from exercising unfettered control over rents. Future homeowners, no less than current homeowners, might—in the absence of rent protection—be "forced to sell their coaches at distress sale prices" (*Azul Pacifico*, 1991 WL 224528, at *6), and the City has a legitimate interest in protecting the investments that these homeowners make.

In addition, the Ordinance provides future homeowners a less obvious, but ultimately no less important benefit—a significant degree of financial stability. Many mobilehome homeowners are either senior citizens living on fixed incomes or young families struggling to pay for their first home. See *supra* p. 6. In either case, they need protection against excessive rent increases. In the absence of rent protection, such purchasers would have no way of planning for potentially exorbitant rent increases that could wreak havoc with their budgets and destroy the value of their investments in their homes.[43]

[43] In arguing that only current homeowners benefit from the Ordinance because the alleged "premium" paid by the future homeowners exactly equals their savings in rent (Brief for Petitioners at 27), petitioners ignore these two benefits that the Ordinance clearly does afford future homeowners. Moreover, petitioners' assumption that current homeowners can extract the full value of future rent savings is questionable at best. At the time of sale, uncertainty about a number of factors—not the least of which would be the number and size of future Board-approved rent increases—would make an accurate calculation of future rent savings virtually impossible. In addition, petitioners' theory assumes that individual homeowners have sufficient market power to extract a "premium" from future purchasers.

II. THE ESCONDIDO ORDINANCE DOES NOT DEPRIVE PETITIONERS OF THEIR RIGHTS TO SUBSTANTIVE DUE PROCESS.

This Court long ago abandoned reliance on the "vague contours"[44] of substantive due process to invalidate a state's regulation of economic activities within its borders. The doctrine of cases such as *Lochner* v. *New York*, 198 U.S. 45 (1905)—"that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded." *Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963). Decisions on the wisdom of laws are for those elected to pass laws; the courts "do not sit as a superlegislature" to reweigh those decisions in their own scales of justice. *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421, 423 (1952). As Justice Black wrote in *Ferguson*, "[w]hether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes"—or George Stigler, James Buchanan, John Kenneth Galbraith or any other economist, for that matter—"is no concern of ours." 372 U.S. at 732. Instead, this Court's role properly is a limited one: it reviews state economic regulation only to ensure that it is rationally related to a legitimate state end. See, *e.g.*, *Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483, 491 (1955).

Reaching back to the 1890's for their substantive due process standard, and relying on essentially the same arguments they make in connection with their *Nollan* challenge, petitioners claim that the Escondido Ordinance is not reasonably necessary to achieve its goal of protecting homeowners from oppressive rents. Because the Ordinance fulfills that goal and also advances the City's legitimate interest in protecting homeowners' significant investments, it necessarily follows that petitioners' substantive due process claim fails.

As this Court recently explained, "[t]he standard for determining whether a state price-control regulation is

[44] *See Adkins* v. *Children's Hosp.*, 261 U.S. 525, 567-68 (1923) (Holmes, J., dissenting).

constitutional under the Due Process Clause is well established: Price control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt." *Pennell* v. *City of San Jose*, 485 U.S. 1, 11 (1988) (internal citations omitted). The Escondido Ordinance plainly passes muster under this highly deferential standard.[45]

A. Escondido's Response To The Problems Of Excessive Rents By Mobilehome Park Owners Was Legitimate And Reasonable.

The immobility of mobilehomes allows park owners to hold their homeowners' significant capital investments hostage: unable to move their homes, homeowners must accept rent increases or abandon their investments. If rents become too high, the homeowners may sell their mobilehomes, but a home sold subject to high rents has little market value, and the homeowners cannot recover the value of the home.[46]

These problems are not merely theoretical. In Escondido, mobilehome owners were subjected to a series of rent increases prior to enactment of Proposition K. These increases posed a significant threat to the health and welfare of these residents, many of whom live on fixed incomes and can pay higher housing costs only by foregoing other necessities, such as food and medical care. In addition, these increases threatened to destroy the value of the tenants' mobilehomes. Indeed, the City expressly found that, when, in response to the Ordinance, park owners forced homeowners to sign long-term leases that exempted their rental spaces from rent protections,

[45] This Court has consistently reviewed legislative enactments and voter-approved measures under the same standard. *See, e.g., Citizens Against Rent Control* v. *City of Berkeley*, 454 U.S. 290, 295 (1981); *Lucas* v. *Forty-Fourth Gen. Assembly*, 377 U.S. 713, 737 (1964).

[46] Even critics of rent control measures recognize that, because of the investments homeowners make in their mobilehomes, park owners are able to extract additional compensation, above and beyond traditional rent. *See supra* note 15.

homeowners who needed to sell in order to relocate for new jobs were unable to do so.[47]

Escondido responded to the economic and social problems created by scarcity and the high cost of moving a mobilehome in a reasonable and responsible manner. At first, the City channelled disputes over rent increases to a private mobilehome dispute resolution forum administered by representatives of the affected groups. When this accord process proved unsuccessful, the City adopted an Ordinance that protects mobilehome owners but simultaneously preserves the park owners' ability to obtain a reasonable return on their property. See *supra* pp. 11-12.

The Ordinance rolls rents for mobilehome spaces back to the levels that existed in 1986 (before park owners instituted a series of increases in anticipation of a rent control measure) and requires that park owners obtain the approval of a rent board before increasing rents in the future. Ordinance § 3; JA 23. These measures plainly serve the legislation's permissible objective of protecting a vulnerable segment of the population from predatory rental practices. The Ordinance eliminates the park owners' ability unilaterally to destroy the value of the homeowners' substantial investments in their mobilehomes and to appropriate the value of those investments through higher rents. As a result, the Ordinance alleviates the economic and social hardships (such as a reduced ability to meet essential needs and the inability to sell a mobilehome should the need arise) that the park owners' economic power could cause and had caused.

The Ordinance, however, does not pursue this entirely legitimate public purpose at the complete expense of mobilehome park owners; rather, it affords owners a number of procedural and substantive protections. Thus, park owners are authorized to file "rent increase application[s] for one or more mobilehome spaces" (Ordinance § 4(a); JA 24), and the Ordinance places no limits on the number or timing of such applications.[48] The Ordinance directs the Rent Review Board to approve "just, fair and reasonable" rent increases, and sets forth 11 factors—including changes in the consumer price index, the rent charged in other parks in the City, and all reasonable costs associated with owning, operating and maintaining the park—that the Board must consider in making that determination. *Id.* at § 4(g)(1)-(11); JA 25-27. In addition, the Board may weigh "any other factors it considers relevant" to the determination of a just and reasonable rent (*id.* at § 4(g); JA 25), and park owners are entitled to a hearing at which they may offer "any testimony that is relevant to the requested rent increase." *Id.* at § 4(f), JA 25.[49] These provisions ensure that park owners can seek and obtain a just and reasonable return on their property.

Finally, the Ordinance does not constitute Escondido's sole response to the problems associated with a lack of affordable housing in general, or the problems that mobilehome owners face in particular. The City has spent substantial sums in rent subsidies and first-time homebuyer assistance. In addition, it has committed $16 million in city funds to a program designed to purchase mobilehome parks from their owners at fair market value and convert them to home ownership. To this end, Escondido has acquired nearly one-tenth of the rental spaces in the City, including 209 spaces in one of petitioners' parks.

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[47] *See* Escondido Ordinance 88-50; JA 33.

[48] Petitioners misleadingly claim that the Ordinance prohibits rent increase applications whenever a home is sold. *See* Brief for Petitioners at 7 (petitioners "challenge those provisions of the Escondido Ordinance that prevent rent adjustments when mobilehome coaches are sold in place"). Nothing in the Ordinance, however, prohibits

[49] In addition, Escondido's rent application forms invite owners to "list additional reasons [they] wish the Board to consider" on their applications. *See* Rent Review Application at 1.

B. The Ordinance Is A Constitutionally Legitimate Exercise Of The City's Police Power.

Petitioners' contention that this regulatory response to a pressing social problem is arbitrary and capricious, and does not reasonably advance the City's legitimate interets, is untenable. This Court has consistently upheld legislation that "prevent[s] excessive and unreasonable rent increases caused by [a] growing shortage of and increasing demand for housing . . . [as] . . . legitimate exercise[s] of [the] police powers." *Pennell*, 485 U.S. at 12 (internal quotation marks and citations omitted). Thus, it has sustained federal and state enactments that, in response to housing shortages, granted administrative agencies authority to review and modify rental terms in individual leases (*Block* v. *Hirsh*, 256 U.S. 135 (1921)) or to roll back and establish reasonable rents on an area-wide basis (*Bowles* v. *Willingham*, 321 U.S. 503 (1944)), as well as statutes that permitted holdover tenancies upon payment of a reasonable rent (*Marcus Brown Holding Co.* v. *Feldman*, 256 U.S. 170 (1921)) or that allowed tenants to resist enforcement of leases on the ground that the rents called for were unjust or unreasonable. *Edgar A. Levy Leasing Co.* v. *Siegel*, 258 U.S. 242 (1922). In each case, the Court recognized that, where the federal or state legislature had properly deemed rental conditions a matter of public concern, it could legitimately regulate the rents charged for rental property. See *Block*, 256 U.S. at 157 ("if the public interest be established the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since [the 1877 decision in] *Munn* v. *Illinois*, 94 U.S. 113").[50]

[50] Petitioners attempt to brush aside this line of authority by suggesting that the Court approved the challenged rent controls only as temporary measures necessitated by war or its aftermath. See Brief for Petitioners at 19 n.5. This Court, however, has consistently cited the decisions in *Bowles* and *Block* as establishing, without qualification, the states' "broad power" to regulate landlord-tenant relationships. *See Pennell*, 485 U.S. at 12 & n.6; *FCC* v. *Florida Power Corp.*, 480 U.S. 245, 252 (1987); *Loretto*, 458 U.S. at 440. Moreover, the rent control cases were decided at a time when this Court subjected legislative judgments concerning the wisdom of regulatory measures to more exacting scrutiny than is employed today and nevertheless upheld them. *See Williamson* v. *Lee Optical, Inc.*, 348 U.S. 483 (1955). The emergency nature of the rent control measures, while relevant in the pre-*Williamson* era decisions, is of no continuing constitutional significance now.

The fact that such rate regulation may adversely affect landlords does not render it impermissible.

> Price control, the same as other forms of regulation, may reduce the value of the property regulated. . . . A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power.

Bowles, 321 U.S. at 517-18. Nor does such regulation run afoul of the constitutional injunction that bars the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Where a housing shortage enables property owners to charge excessive rents, "the owners reap unique benefits from the situation that causes . . . economic hardship, and in that respect singling them out to relieve [that hardship] may not be regarded as 'unfair.'" *Pennell*, 485 U.S. at 20 (Scalia, J., dissenting); see also *id.* at 22 ("Singling out landlords . . . may be within our traditional constitutional notions of fairness, because they can plausibly be regarded as the source or the beneficiary of the high-rent problem"); *Block*, 256 U.S. at 157 (noting that it was "unjust [for landlords] to pursue . . . profits from" a housing shortage).

The renting of mobilehome spaces in Escondido is "clothed . . . with a public interest" sufficient to bring that activity within the scope of the City's broad police power. A shortage of mobilehome rental spaces, combined with the immobility of mobilehomes, allowed park owners to charge excessive rents that, in turn, caused or threat-

ened a number of social and economic hardships. The City then properly corrected the problem by preventing park owners from preying on relatively weaker homeowners. That is a choice that the Constitution permits the City to make.[51]

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[51] Similarly without merit is petitioners' suggestion that they were entitled to test at a trial the validity of the City's belief that unrestrained rent increases threatened the welfare of mobilehome owners. The series of rent increases that prompted the initiative drive, as well as the series of increases that followed initial efforts to enact the Ordinance, afforded the City an ample basis for concluding that park owners would, if unregulated, raise rents to potentially harmful levels. Nor was the City required to find that "unscrupulous landlords" would raise rents so much between tenancies "that incumbent [tenants would be] unable to find buyers." Brief for Petitioners at 33. Rather, it was enough for the City to conclude that automatic rent increases upon vacancies would lead to unfair prices—a conclusion that plainly had a substantial basis. *See supra* pp. 43-47. Because the City is free to defend its economic regulation on any conceivable basis, no purpose would be served by a trial on these undisputed, legislative facts. *See City of New Orleans* v. *Dukes*, 427 U.S. 297, 305 (1976); *Lee Optical, Inc.*, 348 U.S. at 490-91.

CONCLUSION

The decision of the Court of Appeal should be affirmed.

Respectfully submitted,

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